

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
(MBHB Case No. 03-897)

Appl. No. : 10/675,449 Confirmation No. 5599
Applicant : Ryan N. Andrews
Filed : 09/30/2003
TC/A.U. : 3691
Examiner : Bijendra K. Shrestha

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

Dear Sir:

Applicant requests reconsideration of the patent term adjustment in light of the recent *Wyeth v. Dudas* decision (D.D.C., Memorandum Opinion for Case No. 07-1492, Sept. 30, 2008).

Applicant agrees with the Office's Patent Term Adjustment of A delay minus Applicant Delay of 1,074 days. Based on a July 17, 2009 RCE filing date, Applicant submits the B delay is 1,021 days. After taking A delay, Applicant delay, and B delay overlap into account, Applicant requests reconsideration of Patent Term Adjustment to **1,600** days total.

Applicant believes the appropriate fees have been paid for this request. However, please charge any underpayment or credit any overpayment to Deposit Account No. 13-2490.

A. Definition of A Delay and B Delay

According to *Wyeth*, there are three guarantees of patent term under 35 U.S.C. § 154(b). The first, termed "A delay", are extensions due to delays by the PTO beyond statutory deadlines, such as fourteen months for a first response on the merits, four months to issue an office action after a response, and four months to issue a patent after the fee is paid. *Wyeth*, p. 3. The second, termed "B delay", is a "a one-day term extension [that] is granted for every day greater than three years after the filing date that it takes for the patent to issue, **regardless of whether the delay is the fault of the PTO**" *Id.* (emphasis added). The third, termed "C delays", concerning delays due to interferences, secrecy delays and appeals was not substantively addressed by *Wyeth*. *Id.*

35 U.S.C. § 154 also reduces patent term adjustment due to delays by the applicant for the period of time where an applicant failed to engage in reasonable efforts to conclude prosecution of the application. 35 U.S.C. § 154(b)(2)(C)(i). Specifically, the statute defines failing to engage in reasonable efforts to conclude prosecution for any periods of time “in excess of 3 months that are taken to respond to a notice from the Office making any rejection, objection, argument, or other request, measuring such 3-month period from the date the notice was given or mailed to the applicant.” 35 U.S.C. § 154(b)(2)(C)(ii). For purposes of this request, A delay includes reduction in patent term due to delays by the Applicant.

B. Application Summary

The total patent term adjustment indicated on the Determination of Patent Term Adjustment for this application is 1,074 days. Key dates for this application are shown in the table below.

Date	Activity	A Delay	B Delay	Applicant Delay
September 30, 2003	Application Filed			
November 30, 2004	14-Month Date after Application Filed	+		
September 30, 2006	3-Year Date After Application Filed	+	+	
July 30, 2007	First Non-Final Rejection Mailed	+	+	
October 29, 2007	Response to First Non-Final Rejection Filed		+	
January 23, 2008	Second Non-Final Rejection Mailed		+	
April 23, 2008	3-Month Date for Second Non-Final Rejection		+	+
July 22, 2008	Response to Second Non-Final Rejection Filed		+	+
November 22, 2008	4-Month Date after Response to Second Non-Final Office Action	+	+	
June 2, 2009	First Notice of Allowance (NOA) Mailed	+	+	
July 17, 2009	Request for Continued Examination (RCE) Filed		+	
October 8, 2009	Second NOA Mailed			
October 14, 2009	Issue Fee Paid			
November 24, 2009	US Pat. No. 7,624,063 Issued			

A “+” in the A Delay, B Delay, or Applicant Delay column in the table above indicates the Applicant believes the respective delay accrues between consecutive dates with “+” signs. For example, as shown in the table above, Applicant believes that A delay was accrued between November 30, 2004 and July 30, 2007.

C. Calculation of A Delay and Applicant Delay

For the A delay and Applicant delay calculations, the Patent Term Adjustments (PTA) on PAIR for this application indicate a total of 1,074 days, including:

1. An A delay period of 972 days from November 30, 2004 (the 14-Month Date) to the July 30, 2007 mailing date of the First Non-Final Rejection, which was the first action on the merits. Applicant agrees with the determination.

2. Applicant delay of 90 days between April 23, 2008 and July 22, 2008 for delay in filing a response to the Second Non-Final Rejection. Applicant agrees with the determination.

3. An A delay period of 192 days between November 22, 2008 and June 2, 2009 for delay in mailing the First Notice of Allowance. Applicant agrees with the determination.

Therefore, Applicant agrees with the Office that the A delay minus Applicant delay is 1,074 days.

D. B Delay Calculation

The application was filed on September 30, 2003. The three year anniversary of the filing date is September 30, 2006. Applicant submits the B delay period or “B period” is the time from the day after the 3 year anniversary (or September 30, 2006) until either a patent issues for the application, an RCE is filed for the application, or for other reasons not applicable to this application (e.g., interferences and Applicant-requested delays). *See* 35 U.S.C. § 154(b)(1). Specifically, an RCE was filed for this application on July 17, 2009. Applicant submits the B period is between September 30, 2006 and July 17, 2009 for **1,021 total** days.

E. Requested Patent Term Adjustment

The *Wyeth* decision states that “the ‘A period’ and ‘B period’ overlap only if they occur on the same calendar day or days.” *Wyeth*, p. 8. Thus, according to *Wyeth*, Applicant is entitled to both the A delay and the actual B delay minus any overlap which occurs on the same calendar days. As shown in the table above, there are overlaps of A delay and B delay (a) for 303 days between September 30, 2006 and July 30, 2007 and (b) for 192 days between November 22, 2008 and June 2, 2009. Thus, the total Patent Term Adjustment due to both the “A” and “B” delays minus the overlap and Applicant delay is $1,074 + 1,021 - (303 + 192) = 1,600$ days. Therefore Applicant respectfully requests that the Patent Term Adjustment for this case **should be increased from 1,074 to 1,600 days**.

Please contact the undersigned as needed to speed prosecution of this Request for Patent Term Adjustment.

Respectfully submitted,

Date: November 30, 2009

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